

[3] Approximately 5 months later, on 4 March 2021, Mr Teague saw what he considers is his old position advertised on Seek. He applied for the role but was unsuccessful.

[4] Mr Teague raised a personal grievance on 20 April 2021 saying his redundancy was likely unjustified because he had seen an advertisement for a role that had largely identical duties to the one, he was made redundant from. He also said the redundancy was likely to be unlawful because the role still existed, having been absorbed into a new position Mr Chalmers created for himself.

[5] Mr Teague accepts his personal grievance was raised outside of the statutory 90-day timeframe if 90-days runs from the date when he was made redundant. However, he says he only became aware he had a grievance on 4 March 2020 when he saw his old role advertised, and on that basis, he says, he is therefore within 90 days.

[6] The parties agreed at the case management conference to deal with the 90-day issue as a preliminary matter on the papers. Written submissions were received from both parties.

The 90-day rule

[7] Section 114(1) of the Employment Relations Act 2000 (the Act) sets out the statutory time limit for raising a personal grievance. The essence of that provision is the requirement that the employee must raise the grievance with the employer “*within the period of 90 days beginning with the date on which the action alleged to amount to a person grievance occurred or came to the notice of the employee, whichever is the later*” unless the employer agrees otherwise.

[8] The 90-day time limit is designed to ensure that personal grievances raised by employees are able to be addressed and resolved promptly. While the construction placed on s 114 of the Act is that the 90-day period usually begins when the action alleged to amount to a grievance occurs, in a small number of cases, it can begin at a later stage, when the employee becomes aware of the circumstances that led them to believe they have a grievance.

Issues

[9] Focussing on the second limb of the test in s114 of the Act, the issues for determination are:

- (a) What is the action alleged to amount to the grievance?
- (b) When did that action come to Mr Teague's notice?
- (c) Has Mr Teague raised his grievance within 90 days of the action alleged to amount to a grievance, coming his notice?

[10] There can be no question that if the date from which the 90 days is to run from is the date of termination of employment, being 14 October 2020, then by 20 April 2021, when the grievance was raised, he was out of time. However, Mr Teague relies on the second part of the statutory test set out above to argue that the action alleged to amount to a grievance came to his notice when he saw the advertisement on 4 March 2021, and given he raised his grievance on 20 April 2021, that is within 90 days.

[11] Both parties have raised several other issues as context and they are necessarily referred to in passing, but whether or not Mr Teague has a legitimate grievance remains a matter for an investigation meeting at a later stage.

Submissions

[12] Ms White, advocate for Mr Teague relies on the case of *Wyatt v Simpson Grierson*¹ to support the proposition that the 90-day timeframe can run from when the employee becomes aware of circumstances, in some circumstances:

[29] In summary, I find that the construction to be placed on ...s114(1) of the Employment Relation Act 2000 is that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of the those

¹ *Wyatt v Simpson Grierson (A Partnership)* AK AC 45/07 20 July 2007 at [29].

circumstances to the extent necessary to form a reasonable belief that the employer's actions are reasonable.

[13] Ms White also refers to the Authority case of *MacDonald v the Optimum Clothing Company Limited* as a case with similar facts. Ms MacDonald was made redundant but saw her former position advertised outside of the 90-day time limit. The Authority held that the statutory time period started from the day when she realised her redundancy was not genuine and not the date of redundancy.²

[14] Pyroclassic do not consent to a grievance being raised after the expiration of the 90-day period saying that time must run from the date of redundancy which was 14 October 2020. It says the matter is “out of time”.

[15] Mr Robb advanced the argument on behalf of Pyroclassic, that if it is not correct then the test is whether or not Mr Teague had “actual” or “constructive knowledge” to appreciate and recognise that he had available to him the option to raise a personal grievance. Pyroclassic says Mr Teague could not have this knowledge simply from the advertisement and must be able to show that he had it at the time of dismissal.

[16] He also submits that because the role was advertised several months after the redundancy, this is more than enough time for the operational context of any business to have genuinely changed and for a new role as advertised to be required.

[17] Pyroclassic also says the role was different and the employer was different.

[18] While I am not able to determine at this preliminary stage the issue regarding the identity of the employer, it is sufficient to note for the purposes of this preliminary determination that that the statement of problem records Mr Teague was employed by both companies and worked interchangeably with Fourth Element and their associated brands. Photocopies of Mr Teague's business cards for Forth Element were also provided.

[19] A search of the Companies Register also shows Mr Chalmers is the sole director of both Fourth Element Limited and Pyro Fires Limited and is the sole shareholder of one and the majority shareholder in the other.

² *MacDonald v the Optimum Clothing Company Limited* [2012] NZERA Auckland 161

[20] While by no means conclusive, what it does indicate is that the issue of who the employer was is not necessarily straight forward and will be best resolved by way of evidence before the Authority and ultimately, that is a matter for determination at an investigation meeting if the substantive issue proceeds.

What is the action alleged to amount to the grievance?

[21] The restructure proposal provided the following reasons for consultation:

- geographical business expansion and into manufacturing
- the inclusion of additional products
- Mr Chalmers' recent additional capacity
- Mr Chalmers desire to manage business development and account management of all products
- Mr Chalmers wanted to keep himself close to the market and cut travel costs
- as the business owner he wanted to work more actively in the business.

[22] Mr Teague says on reading the advertisement, it became apparent that Mr Chalmers was not performing the role as advised during the consultation on redundancy and this was new information that was not apparent to him during the redundancy process.

[23] What is evident from the restructure proposal is that the rationale for the disestablishment of Mr Teague's role were very heavily focussed on Mr Chalmers as the owner, taking on the work that previously was Mr Teague's role. He had more capacity and wanted to take a role in growing the business as it expanded. It was stated explicitly in the letter setting out the proposal:

“On this basis I am proposing to disestablish the Business Development Manager role and exercise my rights as the owner to more actively work in the business.”

[24] This was the basis on which Mr Teague was consulted and provided feedback and submissions. Had the proposal been simply to expand the role, the obvious question appears to be whether Mr Teague would have been suitable for that role and the next question is whether that could have been offered to him as alternative.

[25] Ultimately Mr Teague is questioning whether the employer acted genuinely during the restructure and redundancy process because the rationale for the redundancy does not appear to match up with Mr Chalmers going to market to fill the role.

[26] It is submitted that the operational context of a business can genuinely change and that is accepted. It is also accepted that as long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and these would be matters for resolution and determination at an investigation meeting.

[27] However, focussing on the 90-day issue, and on the information available to the Authority at this preliminary stage, the changes to the role evident from both the advertisement and the fact of advertising, as compared with what was consulted on, cannot have been known to Mr Teague until the role was advertised, approximately 5 months after the redundancy.

[28] On that basis I am satisfied that the action alleged to amount to the grievance became evident at the time the role was advertised and that information can only have come to Mr Teague’s notice when he saw the advertisement.

Result

[29] Mr Teague has satisfied the Authority that he has raised his personal grievance within 90 days of the action alleged to amount to a grievance, coming to his notice.

[30] This conclusion means that Mr Teague’s substantive matter may proceed in the Authority.

[31] In the interim, I order the parties to attend mediation to attempt to resolve the substantive issue in good faith.

Costs

[32] Costs are reserved.

Sarah Kennedy
Member of the Employment Relations Authority